FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-009502

Employee: Tamara Hill

Employer: The Boeing Company

Insurer: Indemnity Insurance Company of North America
c/o Broadspire Services, Inc.

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 26, 2010. The award and decision of Administrative Law Judge John K. Ottenad, issued March 26, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 4th day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Tamara Hill

Dependents: N/A

Employer: The Boeing Company

Additional Party: Second Injury Fund

Insurer: Indemnity Insurance Co. of North America
C/O Broadspire Services, Inc.

Hearing Date: November 30, 2009

Injury No.: 05-009502

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: JKO

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 7, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was an engineer for Employer, who injured her left knee when she tripped and jerked her knee, because the elevator came to a stop higher than the building floor.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left Knee
14. Nature and extent of any permanent disability: 10% of the Left Knee
15. Compensation paid to-date for temporary disability: $0.00
16. Value necessary medical aid paid to date by employer/insurer? $2,738.22

Employee: Tamara Hill Injury No.: 05-009502

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: Approximately $1,192.30

19. Weekly compensation rate: $675.90 for TTD/ $354.05 for PPD

20. Method wages computation: By agreement (stipulation) of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

16 weeks of permanent partial disability	$5,664.80

22. Second Injury Fund liability: $0.00

TOTAL: $5,664.80

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jeffrey P. Gault.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Tamara Hill	Injury No.: 05-009502
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	The Boeing Company	
Additional Party:	Second Injury Fund	
Insurer:	Indemnity Insurance Co. of North America C/O Broadspire Services, Inc.	Checked by: JKO

On November 30, 2009, the employee, Tamara Hill, appeared in person and by her attorney, Mr. Jeffrey P. Gault, for a hearing for a final award on her claim against the employer, The Boeing Company, its insurer, Indemnity Insurance Co. of North America C/O Broadspire Services, Inc., and the Second Injury Fund. The employer, The Boeing Company, and its insurer, Indemnity Insurance Co. of North America C/O Broadspire Services, Inc., were represented at the hearing by their attorney, Mr. Terry J. Mort. The Second Injury Fund was represented at the hearing by Assistant Attorney General Karin Schute. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

STIPULATIONS:

1) On or about February 7, 2005, Tamara Hill (Claimant) sustained an accidental injury arising out of and in the course of her employment that resulted in injury to Claimant.

2) Claimant was an employee of The Boeing Company (Employer).

3) Venue is proper in the City of St. Louis.

4) Employer received proper notice.

5) The Claim was filed within the time prescribed by the law.

6) At the relevant time, Claimant earned an average weekly wage of $1,192.30, resulting in applicable rates of compensation of $675.90 for total disability benefits and $354.05 for permanent partial disability (PPD) benefits.

7) Employer paid no temporary total disability (TTD) benefits in this case.

8) Employer paid medical benefits totaling $2,738.22.

9) Though nature and extent of disability is still an issue, the knee injury, in and of itself, did not result in permanent total disability for Claimant.

ISSUES:

1) Is Employer liable for future medical care?

2) What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?

3) What is the liability of the Second Injury Fund?

EXHIBITS:

The following exhibits were admitted into evidence:

Employee Exhibits:

A. Boeing medical dispensary records (HealthSouth)
B. HealthSouth Diagnostic Center of North County MRI report
C. Medical treatment records of Dr. Gary Schmidt
D. Medical treatment records of Dr. Mark Miller
E. Medical treatment record of Abbott EMS
F. Boeing medical dispensary records
G. Metro Imaging MRI report
H. Medical treatment records of Dr. Sherry Ma
I. Neuropsychological Evaluation report of Laura Nieder, Ph.D. dated November 15, 2002
J. Neuropsychological Evaluation report of Kristen Sands, Ph.D. dated October 11, 2005
K. Certified medical treatment records of Dr. Ksenija Kos
L. Certified medical treatment records of Dr. Nabil Ahmad
M. Deposition of Dr. Raymond Cohen, with attachments, dated November 4, 2008
N. Deposition of Mr. James England, Jr., with attachments, dated January 29, 2009

Employer/Insurer Exhibits:

1. Medical records, reports and curriculum vitae of Dr. Robert Kramer
2. Certified medical records of Abbott Ambulance, Inc.
3. Certified medical records of Neurology Associates

Second Injury Fund Exhibits:

Nothing submitted into evidence at the time of hearing

Notes: *1) Unless otherwise specifically noted below, any objections contained in these Exhibits are overruled and the testimony fully admitted into evidence.*

2) Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on November 30, 2009.

FINDINGS OF FACT:

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and deposition, the vocational opinion and deposition, and the medical records, as well as my personal observations of Claimant at hearing, I find:

1) **Claimant** is a 43-year-old, currently unemployed individual, who last worked for The Boeing Company (Employer) as an engineer until she left that employment in 2005.

2) Claimant graduated from SIU-Carbondale with a BS in Electrical Engineering in 1989. She testified that she is currently trying to complete her Master's Degree in Systems Engineering through an on-line course offered by the University of Missouri-Rolla. She is taking one class at a time, but is finding it difficult to complete the work because of her memory and concentration problems.

3) Following graduation from SIU-Carbondale, Claimant first worked for The Boeing Company in Washington from 1989 to 1993 in retrofit engineering.

4) In 1992, Claimant was first diagnosed with Multiple Sclerosis (MS). She was noticing numbness in her fingers and toes, and a ringing in her ear. Claimant testified that initially the doctors just watched her condition, but did not provide any significant treatment. She said that her MS had no effect on her work in Washington and she was not using any assistive devices during this time.

5) Claimant left The Boeing Company in 1993 and took a job with American Airlines in Texas, where she worked as an avionics engineer. Claimant testified that the heat in Texas intensified her MS symptoms. She developed tunnel vision and a lack of bladder control. She experienced weakness, a lack of energy and a "bad attitude." Still, despite these problems, Claimant testified that she was not using any assistive devices, like a cane, to get around. Claimant ultimately left the job in Texas because of the problems she was having related to the heat.

6) After leaving American Airlines, Claimant worked as a contract engineer for Aerotech for about six months, and then she began full-time employment with The Boeing

Company in St. Louis in 1999. Claimant testified that her work for Employer was basically performed at a desk in front of a computer. She said the heaviest thing she had to lift was a ream of paper.

7) Medical treatment records from **Dr. Sherry Ma** (Exhibit H) document the treatment Claimant received from her for her MS starting on July 17, 2001. In that first report, Dr. Ma notes that Claimant was first diagnosed with MS in 1992, when her symptoms of tingling and numbness in all four limbs surfaced. An MRI of the brain in 1992 showed demyelinating process. According to the report, her first MS exacerbation occurred when she was in Texas due to the hot summer weather. Claimant lost her peripheral vision, had poor balance, gait disturbance, vertigo and dizziness, and required treatment with prednisone. The report notes that she had several such exacerbations up until 1997, when she started Avonex immunomodulation therapy. Because of that treatment, Claimant had no MS exacerbations from 1997 until the time of the July 17, 2001 report. At the time of this examination, Claimant continued to complain of some tingling and numbness, some muscle spasm, tightness of the muscles especially in the lower extremities, fatigability, urinary incontinence and loss of sexual function. Her memory was fine and she was not using any assistive device for walking. Dr. Ma diagnosed MS still in relapsing-remitting stage, which was probably in remission at the time of this examination. She diagnosed a neurogenic bladder, which is common for MS patients, but no profound cortical atrophy on MRI findings. Her EDSS score was about a 4, which was described as a rather mild stage. She was continued on her once-a-week Avonex injection and given Detrol for her bladder condition. At her follow-up appointment on September 10, 2001, Claimant's condition was about the same. However, by July 15, 2002, Claimant reported that she felt she had a "memory block" word retrieving difficulty, and her bladder control has been getting gradually worse. Claimant was trying different compensating strategies for her memory problem and was doing well in her job. Dr. Ma diagnosed MS with gradual deterioration of her memory. She suspected Claimant was suffering from volume loss or brain atrophy due to the MS. She recommended a new MRI and perhaps a change in her medication.

8) When Claimant was next examined by Dr. Ma (Exhibit H) on August 13, 2002, she reported that the new MRI showed some decreased overall volume of the parenchyma and slight enlargement of the ventricles, but no new MS lesions. Dr. Ma suggested that the parenchymal atrophy could be related to the memory problems. She decided to keep Claimant on the same immunomodulation therapy. By September 25, 2002, Claimant was reporting forgetfulness, poor concentration, difficulty finishing work tasks and difficulty with daily activities. Dr. Ma recommended neuropsychological testing.

9) Claimant saw **Dr. Laura Nieder, Ph.D.** (Exhibit I) on November 15, 2002 for a neuropsychological evaluation. Claimant reported tingling in her fingers and toes, ringing in her ears, difficulty with balance, use of a cane at times, and poor recent memory, although she denied that the memory problems interfered with her work, since she wrote everything down in a notebook. Overall, Dr. Nieder found that Claimant had a mild neurocognitive abnormality with primary deficits in higher level

cognitive skills. Claimant exhibited relative weakness in the organization of new information and marginal performance on measures of divergent reasoning. After the neuropsychological evaluation, Claimant continued to follow up with Dr. Ma (Exhibit H) on December 12, 2002, March 7, 2003 and July 24, 2003. At each visit her MS condition was described as fairly stable. By the time of that last visit, Claimant was even walking without a cane, even though she was unsteady. She was still having problems with her bladder function and a urologic consult was discussed.

10) Prior to her first injury at work in 2003, Claimant testified that she used a cane occasionally. She had a restriction to avoid climbing ladders, and she was unable to drive at night. She had noticed some memory problems, but she was able to work and she received good reviews from her supervisor. When she had trouble walking, she would use a three-footed cane. She said that she mostly used the cane going to and from her car each day.

11) On October 29, 2003, Claimant was on the elevator going between the second and third floors. When the elevator doors opened, the elevator was lower than the building floor, causing her to stumble forward and jerk herself when she tried to exit the elevator. She did not fall to the floor. She testified that she "jerked" her right knee and ankle. She said that Abbott Ambulance arrived and took her to the medical dispensary. She received some physical therapy for the right knee, which improved her symptoms.

12) Medical treatment reports from **Abbott Ambulance, Inc.** (Exhibit 2) confirm her history of injury on this date and her complaints of right knee and right ankle pain. The medical treatment records from the **Boeing medical dispensary** (Exhibit A) document her visit at that facility on October 29, 2003 after having tripped while coming off the elevator. X-rays of the right ankle and right knee were negative. She was diagnosed with a sprained right ankle and a strained right knee. She did not want any medication. When she followed up on November 4, 2003, she reported that her right ankle was fine, but her right knee was still painful. She was given some exercises to perform, but otherwise returned back to full-duty work. By November 11, 2003, Claimant was still complaining of right ankle and knee pain, and she was also walking with a limp. The doctor prescribed a course of physical therapy for her complaints. Claimant then began a course of physical therapy at **HealthSouth** (Exhibit A) for her right knee and right ankle on November 12, 2003. The last note from this round of physical therapy indicates that Claimant never attended her therapy appointment on November 20, 2003, because she was in the emergency room at the hospital after a fall that injured her left leg and ankle.

13) Claimant saw **Dr. Sherry Ma** (Exhibit H) on November 13, 2003 for her regular MS evaluation. She was doing well with Detrol LA for her bladder problems. She denied any new symptoms from the MS. She still complained of poor memory, poor organization and concentration issues, but her balance and problems with paresthesias were about the same. She was given a trial of Adderall to see if that helped her concentration issues. By March 18, 2004, Claimant reported that the Adderall did not help her concentration, and her biggest problem was her bladder control. She was

given a trial of a new medication for her bladder issues. **Dr. Sherry Ma** (Exhibit 3) issued a letter dated April 13, 2004 in which she explained Claimant's need for a wheeled walker with a seat because of progressive problems with her ability to ambulate. The letter notes that she can only walk a short distance and then she has to sit down.

14) Medical records from **Abbott Ambulance, Inc.** (Exhibit 2) confirm that on January 8, 2004, Claimant had an MS exacerbation resulting in her legs getting numb and not cooperating. Claimant sat down to rest, but did not want to go to the hospital.

15) The next note from the **Boeing medical dispensary** (Exhibit A) is dated March 30, 2004. Claimant reported that her right ankle got better, but her right knee keeps hurting and is getting worse. She reported pain with climbing stairs and inclines, as well as with knee extension. She also reported that sometimes the knee will give out and will not support her weight. The report contains a statement from her that her MS may be worsening. She was also using a cane at the time of this examination for support while walking. Another course of physical therapy was prescribed for the right knee, which started on April 2, 2004 and continued through April 14, 2004. She is described in the records as having a shuffling gait, in addition to comments that she fatigues easily. When she met again with the doctor on April 16, 2004, she reported that the knee feels more stable, but the pain in the knee has not improved. Her knee was still locking up with walking. Therefore, the doctor recommended an MRI of the right knee to further evaluate her condition.

16) The MRI of the right knee was taken at **HealthSouth Diagnostic Center of North County** (Exhibit B) on April 20, 2004. The impression was inferolateral Hoffa's fat pad synovitis, with normal meniscal contours, normal ligaments and tendons, and normal patella femoral articulation.

17) Following the MRI, she was continued in physical therapy, and again saw the doctor on June 4, 2004. Her right ankle was fine, but her right knee was painful, more swollen, and locking up and giving out, causing her to fall. She reported having a walker due to her MS, which was really helping her keep her balance. Because of these complaints, she was referred to an orthopedist for further evaluation.

18) Claimant was examined by **Dr. Gary Schmidt** (Exhibit C) on June 30, 2004. She reported a consistent history of her injury at work and of continued anterior knee pain. She denied locking or snapping, but reported two episodes of feeling unstable while walking. She walked with somewhat of a limp. Physical examination revealed tenderness in the infrapatellar region of the fat pad and mild knee effusion. Dr. Schmidt recommended a course of physical therapy and anti-inflammatory medication. Claimant continued her physical therapy at HealthSouth (Exhibit A) and saw Dr. Schmidt (Exhibit C) again on August 26, 2004. Claimant reported some improvement with the physical therapy, with less pain and tenderness. She was walking with a quad cane. She had full range of motion, but some vastus medialis atrophy. Dr. Schmidt diagnosed insertional patellar tendinitis. He prescribed a knee brace, continued physical therapy and continued full-duty work without restriction.

The final physical therapy note in the file is dated October 29, 2003, in which Claimant was still complaining of right knee pain.

19) Claimant returned to see Dr. Sherry Ma (Exhibit H) on January 31, 2005. The note indicates she was seen "urgently with worsening of her symptoms." She had missed several dosages of Avonex and was under a lot of stress at work. Claimant was complaining of increased forgetfulness and disorganization, difficulty with work, increased fatigue and loss of balance. She was walking with a cane for assistance. Her EDSS score was about 5. A repeat brain MRI was recommended.

20) Claimant then saw **Dr. Mark Miller** (Exhibit D) for her right knee pain on February 2, 2005. Claimant described a consistent history of injury and of continued pain with walking or kneeling. She described three separate instability episodes where she had actually fallen. After his physical examination, Dr. Miller diagnosed meniscus tear versus fat pad syndrome. With her history of a twisting injury and her continued pain and instability complaints, he suggested that she may have an injury to an anterior horn of the medial meniscus, which often does not show up on an MRI. Since she had failed conservative management of her symptoms, he recommended a diagnostic arthroscopy, or a Synvisc or cortisone injection for the right knee. The report indicates Claimant wished to proceed with the surgery.

21) Claimant testified that Dr. Miller recommended surgery, but she did not want it because Dr. Miller could not provide her a definite enough opinion that the surgery would help her knee condition. Claimant testified that she wanted a second opinion on the need for that surgery, but she never got one.

22) Following her 2003 right knee injury, Claimant testified that she was not as mobile, and she did not leave her desk as much. She said that she began using a cane all day, every day after the 2003 right knee accident. She did not do many activities outside of her house, and she used motorized carts in the grocery store. She was using a cane more often. However, she testified that she did not believe her MS had changed very much during this time, but she did have some memory loss and concentration problems.

23) On February 7, 2005, Claimant testified that she was once again riding an elevator between the second and third floors. This time, the elevator stopped higher than the building floor, causing her to stumble forward and jerk herself. She testified that she "jerked" her left knee. Again, she did not fall. She said that Abbott Ambulance arrived and took her to the medical dispensary. She saw Dr. Kramer, who drained her left knee and gave her a cortisone injection.

24) The first medical report following this accident was from **Abbott EMS** (Exhibits E and 2) dated February 7, 2005. It contains a consistent history of her tripping, but not falling, when the elevator had not stopped level with the floor. The report indicates that she twisted her left foot. It further noted that she was walking out the front door of the building to meet them as they arrived. She was not using her cane at the time of her fall. She was transported to Boeing medical for further evaluation.

25) Claimant was next examined at the **Boeing medical dispensary** (Exhibit F) on that same date, February 7, 2005, with complaints primarily of left ankle and knee discomfort, but also a feeling that her right foot was swelling. X-rays of the left foot, ankle and knee, and the right foot were all negative. She was diagnosed with a left knee strain, left ankle/foot strain and a right foot strain. When she followed up on February 11, 2005, Claimant reported that she felt she was doing better. Her left foot was a little swollen, "but it usually is to some degree." She also reported a little soreness in the left knee. The doctor found that her right and left ankles were pain-free, and her knee was not painful to move or walk, only tender to touch. She was back to a normal gait with her cane. The doctor diagnosed an improving left knee strain and discharged her from care.

26) Claimant had the MRI of the brain (Exhibit H) with and without contrast on February 9, 2005. She next saw Dr. Ma on February 23, 2005. Dr. Ma read the MRI as showing no active lesion, but a progression of brain atrophy and ventricular dilatation. She assessed Claimant as having MS, relapsing and remitting type, with cognitive impairment.

27) Additional records from **Abbott Ambulance, Inc.** (Exhibit 2) document service calls on February 15, 2005 for bilateral knee pain caused by walking a distance to get to her car, and on March 8, 2005 for knee pain and tingling after walking around and gathering a bunch of signatures on paperwork at work.

28) Claimant came under the care of **Dr. Robert Kramer** (Exhibit 1) for her knees on March 10, 2005. His report contains a consistent history of the injury at work in 2003 as well as four other subsequent falls she attributed to the weakness in her legs from the MS. He diagnosed her with right knee pain based on her physical examination and his review of the records. He opined that her MS was the cause of the weakness and instability in her legs. He would not recommend surgery related to the October 2003 injury and thought she was at maximum medical improvement for that right knee injury.

29) Apparently, because of continued left knee problems, Claimant had an MRI of the left knee taken at **Metro Imaging** (Exhibit G) on March 31, 2005. The MRI revealed minimal joint effusion and subtle osseous deformity involving the medial femoral condyle which could represent an osteochondral injury or osteochondritis dissecans, but no meniscal or ligamentous tears identified.

30) She had a similar evaluation with Dr. Kramer (Exhibit 1) on April 21, 2005 regarding her left knee. He diagnosed a left knee strain. Dr. Kramer felt she would benefit from a left knee aspiration and cortisone injection. He performed the cortisone injection on April 26, 2005. He then apparently released her from care on May 17, 2005.

31) Employer paid medical benefits totaling $2,738.22, but paid no temporary total disability (TTD) benefits in this case.

32) Claimant continued to work after the 2005 injury, but she rarely got up from her desk. She said that she had a really bad attitude. She said that her knees would give out on her at times, and they were painful and unstable. She testified that she did not end up working that long, because she was in pain mentally and physically. She also noted that her MS cognitive symptoms were making it difficult to do her job.

33) When Claimant was next examined by Dr. Sherry Ma (Exhibit H) on April 7, 2005, she was unchanged from the prior visit. She had applied for short-term disability and the company was asking for a letter regarding her work restrictions and medical limitations. Dr. Ma noted that Claimant had had a cognitive decline, ambulation issues and an inability to function at her baseline level. On April 28, 2005, Claimant reported that she was not doing well and she was taking sick leave from work. She was using a cane to walk. Her disability had not been approved. Dr. Ma diagnosed MS, cognitive impairment due to MS and spastic gait due to MS.

34) Claimant's last visit with Dr. Ma (Exhibit H) occurred on June 9, 2005. Claimant requested paperwork for long-term disability. She reported that she has less stamina and her depth perception was worse since her last visit. Her memory was also not as good and she had increased numbness and tingling in both hands. However, her bladder function was the same and she was still using a cane. In addition to cognitive impairment and spastic gait due to her MS, Dr. Ma also diagnosed decreased stamina and depression, for which she prescribed some medication for Claimant.

35) Claimant then began a course of treatment with **Dr. Ksenija Kos** (Exhibit K) on June 29, 2005 for her MS. The report contains a history of her complaints and treatment for the MS up to that point. Claimant reported "constant fatigue and cognitive decline." The report indicates, "This is the reason why she recently stopped working." Although there was a discussion of a car accident in 1999, there was no mention of the two work injuries from 2003 and 2005. Dr. Kos diagnosed MS that appears to be stable, but may be slowly progressive or secondary progressive. He recommended a course of care to try to deal with her continued symptoms.

36) **Dr. Kristen Sands, Ph.D.** (Exhibit J) met with Claimant for a follow-up neuropsychological evaluation at the request of Dr. Kos on October 11, 2005. Claimant reported that her memory loss had increased substantially and her boss was noticing problems with memory and repeating herself. Claimant had been off work since April 2005. She complained of decreased speech articulation, poor handwriting and diminished spelling skills. She was using a walker more often, whereas she had been using a cane from time to time. Claimant's husband reported that her short-term memory loss has become a significant problem, and she was also having communication difficulties. In comparing her recent test results with those from her prior evaluation on November 15, 2002, Dr. Sands found that Claimant "exhibits significant neurocognitive deterioration affecting speed of information processing, cognitive flexibility, mathematical efficiency, multimodal memory, word retrieval skills, spatial abilities, and higher abstract reasoning and problem solving." She characterized the deterioration in her overall mental status compared to the previous exam, as "fairly widespread." She classified Claimant, now, as having moderate

impairment and she also found that Claimant was no longer asymptomatic for psychological stress as a result of her condition. Dr. Sands recommended that Claimant maintain cognitive activity and productivity to the extent she is able. She recommended that Claimant pursue a position with part-time job functions already known to her, such as in mathematics. Dr. Sands wrote, "Based on her current cognitive profile, she should qualify for disability from her job as an electrical engineer."

37) Claimant was then examined by **Dr. William Logan at the St. John's Mercy Medical Center Emergency Room** (Exhibit K) on March 4, 2006. She went to the emergency room with complaints of progressive weakness in her legs. Claimant explained that in recent years she had a decline in her gait, resulting in falls on occasion, as well as moving from a cane to a walker for standard activity. She reported increased problems with memory and concentration over the past year. Further testing was ordered to try to determine the reason for her decline over the last few weeks. Dr. Reddy's notes from March 5, 2006 at the hospital, show that in addition to the increased lower extremity weakness and unsteady gait, Claimant was also reporting increased blood sugar levels, recurrent urinary tract infections, and that she has been prone to falls even though she is using a walker at home.

38) Claimant treated with **Dr. Nabil Ahmad** (Exhibit L) for her low back pain from August 31, 2007 through June 4, 2008, based on the records admitted into evidence in this case. Dr. Ahmad found, as of August 31, 2007, that her low back pain and bilateral sacroiliac joint pain has become so limiting that she has problems standing and walking. There was no description of any discreet injuries contained in his reports. Dr. Ahmad attributed her gradually worsened low back pain to her MS that was adversely affecting her gait. He recommended a course of facet joint injections to try to relieve her low back complaints. He performed bilateral L4-5 and L5-S1 facet joint injections under fluoroscopy on May 12, 2008. By June 4, 2008, Claimant reported some easing of her pain with the injections. Based on her ambulation because of the MS, he recommended a course of continued treatment to try to alleviate her complaints.

39) The final note from Dr. Kos (Exhibit K) is dated December 8, 2008. Since her prior visit on July 23, 2007, Claimant described a worsening of her gait and falling frequently. She continued to use a walker, complained of short-term memory problems, and also now had low back pain. Claimant was described as a high fall risk because she was very unsteady and walked with a walker. Dr. Kos noted that Claimant seemed to be doing worse with her MS symptoms compared to her last evaluation.

40) Claimant was sent by her attorney for an examination with **Dr. Raymond Cohen** (Exhibit M). According to Dr. Cohen's report dated September 26, 2006, Claimant provided a consistent history of the injuries at work in 2003 and 2005, but she also apparently reported that "she could walk fairly well between the two primary work-related injuries, although her gait became wider based after the injury on or about 2-7-05." She also apparently stated, "that now she uses a cane if she only has to go a short

distance." Otherwise, she uses a motorized cart in a store or a Rololator. She reported low back pain that began in 2005, and noted that she walked differently since injuring her knees. She noted that she wears knee braces to help her walk. Claimant reported her prior diagnosis of MS, and restrictions on balance and working in heat that caused her problems. She admitted that the MS made her gait uncoordinated and she also had bladder issues. She also reported prior problems with memory and fatigue related to the MS.

41) Dr. Cohen reviewed the medical treatment records and performed a physical examination. He diagnosed fat pad syndrome (Hoffa's fat pad disease) of the right knee related to the October 29, 2003 injury, a left knee osteochondral injury related to the February 7, 2005 accident, and pre-existing severe multiple sclerosis with chronic fatigue, cognitive dysfunction, incoordination and neurogenic bladder. Dr. Cohen opined that she needed further treatment on her knees because of the symptoms she continued to have. He recommended that she be seen by an orthopedic surgeon for consideration of a diagnostic and therapeutic arthroscopy of each knee. However, assuming that she had no further treatment, Dr. Cohen opined that Claimant had 25% permanent partial disability of the right knee due to the October 29, 2003 accident and 15% permanent partial disability of the left knee due to the February 7, 2005 accident. He rated a 40% permanent partial disability of the body as a whole referable to the pre-existing MS. He further opined that the disabilities combined to create an overall disability greater than their simple sum, and that the combination of the disabilities rendered Claimant permanently and totally disabled.

42) The deposition of **Dr. Raymond Cohen** was taken by Claimant on November 4, 2008 to make his opinions in this case admissible at trial (Exhibit M). Dr. Cohen is a board certified osteopathic neurologist. He examined Claimant on one occasion, September 26, 2006, at the request of Claimant's attorney, and he provided no medical treatment to Claimant. Dr. Cohen testified consistent with his opinions contained in his report and described above. In characterizing the severity of Claimant's MS condition prior to the knee injuries, Dr. Cohen responded that it was "fairly severe" and progressive from 1992 up until the time he saw her. He explained that the fact she had a neurogenic bladder that required medications, was a bad sign of MS. Dr. Cohen explained some of the more pertinent findings on his physical examination of Claimant. He pointed to the hyperactive reflexes in the arms and legs, the clonus in the legs (the foot keeps shaking when pushed up toward the knee) and the borderline Babinski's test as signs of central nervous system pathology related to the MS. On the right knee exam, she had mild effusion, tenderness to palpation, crepitus, a mild loss of range of motion and mild weakness. On the left knee exam, she had mild effusion, discomfort with palpation and a very mild loss of range of motion, but no weakness, crepitus, or instability.

43) On cross-examination, Dr. Cohen was asked about his understanding of Claimant's problems with her gait or walking before the knee injuries. Dr. Cohen testified that he remembered only one note prior to her knee injuries that discussed a problem with tandem walking, but other than that he did not find a lot of evidence of any progressive problems with her gait prior to the knee injuries. However, now, after the

knee injuries, she definitely had difficulties with walking. Dr. Cohen believed her only prior problems with walking had to do with strength or walking fast, but he did not believe she had problems with stability prior to the knee injuries.

44) **Mr. James England, Jr.** (Exhibit N) met Claimant for a vocational rehabilitation evaluation on May 29, 2007 at the request of her attorney. He interviewed Claimant and also reviewed her medical treatment records. Claimant admitted, in Mr. England's report, that her MS has become progressively worse over the years. She admitted that even before the knee injuries, she could not walk straight and had poor balance. Claimant told Mr. England she is most limited by her confusion and memory loss, followed by the severe pain in her knees and back, and then poor upper extremity coordination. She described continued problems with being on her feet for more than seven minutes at a time, and she must use a walker to go more than very short distances. She cannot bend, lift or carry more than a gallon of liquid, sit more than an hour, or drive more than a 3-4 mile radius. She described poor grip. She drops things, cannot write as long now, and cannot keyboard more than briefly before missing the keys. Mr. England agreed that the neuropsychological testing showed her condition was worsening instead of improving. Mr. England ultimately concluded that considering the combination of her physical limitations and those of a neurocognitive nature, he did believe a normal employer in the course of business would hire her, and, therefore, he did not believe she was competitively employable. He opined that she was totally disabled from a vocational standpoint.

45) The deposition of **Mr. James England, Jr.** (Exhibit N) was taken by Claimant on January 29, 2009 to make his opinions in this case admissible at trial. Mr. England is a certified vocational rehabilitation counselor. Mr. England testified consistent with the opinions contained in his report. He essentially concluded that Claimant was unemployable in the open labor market due to the combination of her physical and neurocognitive impairments and restrictions. When pressed on cross-examination, Mr. England agreed that Claimant's cognitive condition, attributable to her MS, has deteriorated since 2005. He agreed that Claimant's limitations from the MS, from a cognitive standpoint, would preclude even sedentary work for her, and those MS limitations would also preclude physical work that exceeded the sedentary demand level. ***Therefore, Mr. England agreed that if you looked just at the limitations from the MS, excluding the two knee injuries, she would still not be employable.***

46) Claimant was seen by **Dr. Robert Kramer** (Exhibit 1) for an independent medical examination at Employer's request on March 31, 2009. Dr. Kramer is a board certified orthopedic surgeon. Since his initial examinations of her on March 10, 2005 and April 21, 2005, according to his report, Claimant told him that her MS has progressed resulting in frequent falls or sliding out of chairs due to the weakness in her legs. She noted crawling on her knees a lot to get around. She reported being on Social Security because of her MS. Claimant described muscle spasms that lock her knees out straight, and discomfort, achiness and soreness in the knees. She walked with a spastic, slow, steady, wide-based gait using a walker. His physical examination revealed full range of motion, with no effusion, no instability, and only some tenderness and thickening over the anterior tibial tubercle in each knee. Dr.

Kramer diagnosed bilateral anterior knee pain and bilateral lower extremity weakness, secondary to MS. He opined that Claimant had no residual injuries to her right and left knees from these accidents. He opined that the current condition of her knees was attributable to her subsequent falls, and that her gait abnormality and instability was secondary to her MS. Dr. Kramer did not believe she needed any further orthopedic treatment for either knee. He further opined that she had no permanent partial disability in either knee attributable to these accidents at work.

47) In terms of her current complaints and ability to function, Claimant testified that it is very difficult to exercise because of the pain in her knees. She said that sometimes her knees give out and sometimes they lock up on her. She estimated that she spends 98% of her time in a wheelchair now, and, in fact, she appeared for trial and testified from her wheelchair. She noted that she needs assistance getting out of bed in the morning because of problems with falling. Claimant takes 14 medications in the morning every day. She said that more recently she developed a blood clot from being in the wheelchair so much.

48) On cross-examination from Employer, Claimant confirmed the progression of her use of assistive devices for walking. She started out using a cane, then went to a quad cane around the time of her fall in 2003, a rolling walker in 2004, and then a wheelchair after 2005, perhaps in 2007 sometime. Claimant admitted that before 2003 she did collapse because of a loss of strength. She admitted that she also suffered from a lack of motor coordination both before and after 2003. She explained that she would try to move her foot, but could not, or she would try to get up out of a chair, but could not. Claimant admitted that she is not under any active treatment for her knees. She further admitted that she was told prior to 2003 that she had arthritis in the knees. Prior to 2003, she also admitted that she had problems with depth perception and carrying things overhead. Prior to 2003, she was wobbly while trying to walk a straight line and she was prohibited from driving Boeing company vehicles. Finally, she admitted that her MS has gotten worse since October 2003 because she is now in a wheelchair.

49) On cross-examination from the Second Injury Fund, Claimant agreed that Dr. Miller's report indicates she did not have significant lower extremity problems related to her MS, but nonetheless, she had fallen twice, because of lack of strength and fatigue, even though she was using a cane. Although Dr. Ma's records indicate she was seen urgently on January 31, 2005 because of a worsening of her MS symptoms, Claimant testified that she did not remember any such urgent visit. She admitted that in 2007, her MS was preventing her from getting out of bed in the morning.

50) Claimant testified that she did not believe she could return to work, even if her knees were not injured in the falls, because of the extent of the MS symptoms she is experiencing. She admitted that she missed no work because of her MS prior to the 2003 accident. While she was having memory problems in 2002, she was not having any problems with work. However, she admitted her memory problems increased in 2005.

RULINGS OF LAW:

Based on a comprehensive review of the above-stated evidence, including Claimant's testimony, the expert medical opinions and deposition, the vocational opinion and deposition, and the medical records, as well as my personal observations of Claimant at hearing, and based upon the applicable laws of the State of Missouri, I find:

As a result of the February 7, 2005 accident, which arose out of and in the course of her employment, Claimant sustained a compensable injury to her left knee. As a result of the injury to her left knee, adequately described in the records and reports of Abbott EMS, the Boeing medical dispensary, Dr. Kramer, Metro Imaging and Dr. Cohen, Claimant continued to have pain, mild effusion, discomfort with palpation and a very mild loss of range of motion, but no weakness, crepitus, or instability.

Issue 1: Is Employer liable for future medical care?

Under **Mo. Rev. Stat. § 287.140.1 (2000)**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment…as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Just as Claimant must prove all of the other material elements of her claim, the burden is also on her to prove entitlement to future medical treatment. ***Dean v. St. Luke's Hospital***, 936 S.W.2d 601, 603 (Mo. App. 1997) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).* Claimant is entitled to an award of future medical treatment if she shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. ***Concepcion v. Lear Corporation***, 173 S.W.3d 368, 372 (Mo. App. 2005).

In this case, Claimant seeks an award of open future medical treatment for her left knee. In order to meet her burden of proof in this matter, Claimant submits the medical opinion of Dr. Raymond Cohen, an osteopathic neurologist. Dr. Cohen testified on November 4, 2008, based on his report and examination from September 26, 2006, that because of her continued symptoms, he would recommend that Claimant see an orthopedic surgeon for consideration of an arthroscopic procedure on both knees for diagnostic and therapeutic purposes. Essentially then, I find that his only opinion on the need for future treatment for the left knee was for a consultation with an orthopedic surgeon who can determine if an arthroscopic procedure is warranted.

I further find that subsequent to his examination and testimony, Claimant was examined by Dr. Robert Kramer, a board certified orthopedic surgeon, on March 31, 2009. Dr. Kramer specifically considered whether or not Claimant was in need of surgery, or any other treatment for that matter, for the left knee and decided that she was not. Therefore, I find that Employer has already met the recommendation of Claimant's physician regarding the need for an orthopedic consult.

Having met Claimant's physician's recommendation for an orthopedic consult, and having produced competent and reliable evidence from a qualified orthopedic surgeon that no

other treatment is necessary on account of this left knee injury from February 7, 2005, I find that Employer has met their responsibility to provide medical treatment to cure and relieve Claimant of the effects of this left knee injury. I further find that Claimant has failed to produce any competent or credible evidence on this issue of the need for future medical treatment for her left knee, by failing to provide medical opinions that recommend any other treatment that may be needed. Accordingly, Claimant's request for future medical treatment for her left knee is denied.

Issue 2: What is the nature and extent of Claimant's permanent partial and/or permanent total disability attributable to this accident?

Issue 3: What is the liability of the Second Injury Fund?

Given that these two issues are so inter-related in this Claim, and, further, given Claimant's allegation that she is permanently and totally disabled, I will address these two issues together.

Claimant bears the burden of proof on all essential elements of her Workers' Compensation case. ***Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute***, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).* The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. ***Id***. at 199.

Under **Mo. Rev. Stat. § 287.190.6 (2000)**, "'permanent partial disability' means a disability that is permanent in nature and partial in degree…" The claimant bears the burden of proving the nature and extent of any disability by a reasonable degree of certainty. ***Elrod v. Treasurer of Missouri as Custodian of Second Injury Fund***, 138 S.W.3d 714, 717 (Mo. banc 2004). Proof is made only by competent substantial evidence and may not rest on surmise or speculation. ***Griggs v. A.B. Chance Co.***, 503 S.W.2d 697, 703 (Mo. App. 1973). Expert testimony may be required when there are complicated medical issues. ***Id***. at 704. Extent and percentage of disability is a finding of fact within the special province of the [fact finding body, which] is not bound by the medical testimony but may consider all the evidence, including the testimony of the claimant, and draw all reasonable inferences from other testimony in arriving at the percentage of disability. ***Fogelsong v. Banquet Foods Corp.***, 526 S.W.2d 886, 892 (Mo. App. 1975) (citations omitted).

Under **Mo. Rev. Stat. § 287.020.7 (2000)**, "total disability" is defined as the "inability to return to any employment and not merely … inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in her present physical condition. ***Searcy v. McDonnell Douglas Aircraft Co***., 894 S.W.2d 173 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).*

In cases such as this one where the Second Injury Fund is involved, we must also look to **Mo. Rev. Stat. § 287.220 (2000)** for the appropriate apportionment of benefits under the statute. In order to recover from the Fund, Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. ***Messex v. Sachs Electric Co.,*** 989 S.W.2d 206 (Mo. App. E.D. 1999) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).* Then to have a valid Fund claim, that pre-existing permanent partial disability must combine with the primary disability in one of two ways. First, the disabilities combine to create permanent total disability, or second, the disabilities combine to create a greater overall disability than the simple sum of the disabilities when added together.

In the second (permanent partial disability) combination scenario, pursuant to **Mo. Rev. Stat. § 287.220.1 (2000)**, the disabilities must also meet certain thresholds before liability against the Second Injury Fund is invoked. The pre-existing disability and the subsequent compensable injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole, or 15% permanent partial disability of a major extremity. These thresholds are not applicable in permanent total disability cases.

It is first necessary to determine whether Claimant is permanently and totally disabled, and then the nature and extent of the permanent partial and/or permanent total disability against Employer. Based on the evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at hearing, I find that Claimant is permanently and totally disabled under the statute, but that permanent total disability is not against Employer as a result of the last injury alone. Employer only has liability in this case for permanent partial disability related to the left knee injury from February 7, 2005.

In reviewing the medical records and reports in evidence, I found that Dr. Cohen and Mr. England provided opinions that Claimant was unable to continue working and, thus, essentially permanently and totally disabled. Additionally, I found that Dr. Ma, in her last few office reports, was completing paperwork and forms that would allow Claimant to make applications for short-term and long-term disability. Although, as will be explored more below, I may disagree with the reasoning and the factors some of the experts have used to reach this conclusion, I do not disagree with their ultimate conclusion that Claimant is unable to compete in the open labor market and that she is unable to return to any employment. However, none of those experts indicated that the permanent total disability was the result of the last injury alone. Therefore, I find there is no evidence in the record to substantiate a finding of permanent total disability against Employer.

I find that Claimant has successfully met her burden of proof that Employer is responsible for the payment of permanent partial disability at the level of the left knee related to the February 7, 2005 injury.

With regard to the left knee injury from the 2005 accident, Dr. Cohen rated Claimant as having 15% permanent partial disability of the left knee. This rating accounted for his diagnosis of a left knee osteochondral injury, and his findings on physical examination of mild effusion,

discomfort with palpation and a very mild loss of range of motion, but no weakness, crepitus, or instability. Dr. Kramer rated Claimant as having no permanent partial disability of the left knee based on the diagnosis of a left knee strain from her work injury, despite his having performed a left knee aspiration and cortisone injection. I also note the findings on the left knee MRI, which showed minimal joint effusion and subtle osseous deformity involving the medial femoral condyle which could represent an osteochondral injury or osteochondritis dissecans, but no meniscal or ligamentous tears identified.

On the basis of all of these findings, as well as based on Claimant's testimony and the medical evidence, I find that Claimant has 10% permanent partial disability of the left knee attributable to the February 7, 2005 injury. This finding of 10% permanent partial disability for the 2005 injury accounts for the subtle osseous deformity involving the medial femoral condyle discovered on the MRI, and also takes into account the findings of mild joint effusion, very mild lost range of motion and tenderness, but no crepitus or instability.

Having now established the nature and extent of the permanent partial disability attributable to the primary injury against Employer, it is now appropriate to determine whether or not Claimant has successfully met her burden of proving Second Injury Fund liability for permanent total or permanent partial disability.

I find that the central issue in this case, as far as Second Injury Fund liability is concerned, revolves around the symptomology attributable to the multiple sclerosis and the extent to which the MS affects Claimant's ability to compete in the open labor market and be employable. In other words, is the MS responsible for Claimant's permanent total disability by itself (without any combination with the knee injuries), and/or did the MS deteriorate subsequent to the 2005 injury, and unrelated to it, resulting in the permanent total disability.

I find that the medical treatment records for Claimant's MS clearly show a progression of the disease from July 17, 2001 through December 8, 2008. At the time of her July 17, 2001 examination, Claimant continued to complain of some tingling and numbness, some muscle spasm, tightness of the muscles especially in the lower extremities, fatigability, urinary incontinence and loss of sexual function. Her memory was fine and she was not using any assistive device for walking. On July 15, 2002, I find that she reported increased memory problems and a worsening bladder condition, but she was using new memory compensating strategies and doing well in her job. Although a brain MRI in 2002 showed some decreased overall volume of the parenchyma and slight enlargement of the ventricles, and although neuropsychological testing on November 15, 2002 showed a mild neurocognitive abnormality with primary deficits in higher level cognitive skills, Claimant's MS condition up through July 24, 2003 was described as fairly stable and she was working full time regular duty in her job as an engineer. In November 2003 and March 2004, Claimant's biggest problems seemed to be bladder control. However, on April 13, 2004, Dr. Ma did write a letter explaining Claimant's need for a wheeled walker with a seat because of progressive problems with ambulation. When Claimant was examined on January 31, 2005, Claimant indicated a need to be seen "urgently with worsening of her symptoms." Claimant reported increased forgetfulness and disorganization, difficulty with work, increased fatigue and loss of balance after missing several doses of medication and after being under a lot of stress at work.

Following her February 7, 2005 injury, I find that Claimant's brain MRI on February 9, 2005 showed a progression of her brain atrophy and ventricular dilatation. Claimant testified that after the 2005 knee injury, she did not end up working that long because her MS cognitive symptoms were making it difficult to perform her job. By June 9, 2005, her depth perception was worse since her last visit and she had less stamina. She had increased numbness and tingling in both hands and her memory was not as good. When Claimant saw Dr. Kos for the first time on June 29, 2005, Claimant reported "constant fatigue and cognitive decline." The report indicates, "This is the reason why she recently stopped working."

New neuropsychological testing on October 11, 2005 showed that Claimant "exhibits significant neurocognitive deterioration affecting speed of information processing, cognitive flexibility, mathematical efficiency, multimodal memory, word retrieval skills, spatial abilities, and higher abstract reasoning and problem solving." Dr. Sands characterized the deterioration in her overall mental status, compared to the previous exam, as "fairly widespread." Claimant reported that her memory loss had increased substantially and her boss was noticing problems with memory and repeating herself. Claimant had been off work since April 2005. She complained of decreased speech articulation, poor handwriting and diminished spelling skills. She was using a walker more often, whereas she had been using a cane from time to time. Claimant's husband reported that her short-term memory loss has become a significant problem, and she was also having communication difficulties. By December 8, 2008, Claimant reported to Dr. Kos that her gait had again worsened and she was falling frequently. Dr. Kos noted that her MS symptoms had worsened since he last saw her.

While there is no doubt in my mind, that the MS was a hindrance or obstacle to Claimant's employment or reemployment in the open labor market prior to the 2005 left knee injury, I further find that there is significant, competent and substantial evidence in the record to show that the MS condition progressively worsened after the 2005 injury, independent of the effects of that left knee injury. Based on the medical treatment records of Dr. Ma, Dr. Sands, and Dr. Kos, as well as the testimony of Claimant herself, I find that the MS subsequently deteriorated, in that Claimant suffered from a cognitive decline, constant fatigue, decreased speech articulation, poor handwriting, diminished spelling skills, increased memory loss, poorer depth perception, increased numbness and tingling in the hands, increased unsteadiness and worsening gait. The MRI of the brain taken after the 2005 left knee injury also showed an objective progression of her brain atrophy and ventricular dilatation. I find that it was this worsening of her cognitive abilities after the 2005 injury that ultimately resulted in her inability to work, based not only on the findings and comments in the medical records to that effect, but also based on Claimant's own testimony that her memory problems increased in 2005 and ultimately she was unable to continue working because of it.

The Second Injury Fund is not responsible for the subsequent worsening (progression) of a pre-existing condition when that subsequent worsening or deterioration is unrelated to the primary compensable injury against Employer. ***Garcia v. St. Louis County,*** 916 S.W.2d 263 (Mo. App. E.D. 1995) *overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).*

Since there is no evidence in the record to tie the subsequent worsening of this MS condition in any way to the 2005 left knee injury, based on all of this evidence and the balance of

the medical treatment records in evidence for this period of time, I find that the significant worsening of the MS condition after the February 7, 2005 injury represents a subsequent deterioration of a pre-existing condition unrelated to the primary left knee injury. Therefore, since the worsening for the MS condition was a significant factor in her inability to continue working following the left knee injury, I find that the Second Injury Fund has no responsibility for that permanent total disability.

Now, I recognize that some of the medical records documenting the subsequent deterioration of the MS condition are close in time to the February 7, 2005 knee injury date allowing for, perhaps, an argument that the MS condition had worsened enough prior to the 2005 injury to allow for a finding of permanent total disability without even considering the subsequent deterioration. However, even if I did not consider this to be a subsequent deterioration case, I would still find that the Second Injury Fund has no liability for the permanent total disability because Claimant failed to prove that it was a combination of her disabilities that resulted in permanent total disability, as opposed to the effects of the MS standing alone.

In order for Claimant to have a valid claim for permanent total disability against the Second Injury Fund, Claimant must prove that it was the combination of the primary left knee injury and the pre-existing disabilities that renders her permanently and totally disabled. If the combination did not result in the permanent total disability, then the Second Injury Fund as no liability for the permanent total disability. In this case, I find based on the competent, credible and reliable evidence in Dr. Ma's medical records and Mr. England's vocational testimony that the MS condition and its resulting symptomology, in and of itself, resulted in enough disability to render Claimant permanently and totally disabled independent of the left knee injury at work on February 7, 2005. Therefore, Claimant has failed to prove a combination of disabilities and her Claim fails against the Second Injury Fund in that respect.

The medical treatment records from Dr. Ma and Dr. Kos document the profound problems Claimant was having with her MS condition that impacted her ability to work. Among other things, because of her MS condition, Claimant had: Problems with eyesight (poor depth perception and loss of peripheral vision); problems driving (no night driving and no driving more than 3-4 miles from her home); problems with her upper extremities (numbness and tingling in her hands, poor coordination, and poor handwriting); problems with her lower extremities (unsteadiness, use of assistive devices for walking, poor balance, inability to walk straight, weakness, falling, and gait disturbance); problems with bladder function (neurogenic bladder); fairly widespread cognitive decline (loss of memory, diminished spelling skills, communication difficulties); decreased stamina; increased fatigue; decreased speech articulation; and decreased concentration. Considering these complaints related solely to the MS, I find Claimant had profound limitations regarding the use of her eyes, both arms, both legs, her speech and cognition. I find that any restrictions she may have had attributable to her knees from the 2003 and 2005 injuries are fully overshadowed by, and encompassed in, the already profound restrictions she had on the use of her legs based on the MS. After all, just from the MS, she already had poor balance, fatigue, gait disturbance, weakness, lack of coordination and the need to use an assistive device.

I find it significant that despite having had these injuries in 2003 and 2005 to each knee, nowhere in Dr. Ma's records or in Dr. Kos' records is there any mention of the knee injuries or any impact those injuries were having on her ability to function. Instead, I find that Dr. Ma was providing short-term and long-term disability applications for Claimant based solely on the effect of her MS condition. Claimant admitted to Dr. Kos that it was the constant fatigue and cognitive decline that caused her to stop working in 2005. Claimant admitted at hearing that she did not believe she could return to work, even if her knees were not injured in the falls, because of the extent of the MS symptoms she is experiencing. Even Claimant's vocational expert, Mr. James England agreed that if you looked just at the limitations from the MS, excluding the two knee injuries, she would still not be employable. All of this evidence leads me to the conclusion that the profound effects and limitations from the MS condition, in and of itself, was enough to render Claimant permanently and totally disabled.

Admittedly, Dr. Cohen does provide some testimony, that in his opinion, it was the combination of the knees and the MS that rendered Claimant permanently and totally disabled. However, I do not find Dr. Cohen's opinion on the combination of the disabilities and how that impacts Claimant's ability to work, to be as competent, credible and reliable as the statements and opinions contained in Dr. Ma's and Dr. Kos' treatment records or as the ultimate vocational testimony from Mr. England. Dr. Cohen apparently reached this conclusion on the combination of the injuries based on his understanding of the situation that Claimant was not having significant problems with walking before the knee injuries and was having significant problems with walking after them. He believed her only prior problems with walking related to strength but not stability. However, I find these assumptions upon which he based his opinions were inaccurate. The records from Dr. Ma starting in 2001 refer to problems with poor balance and gait disturbance. The neuropsychological exam in 2002 refers to Claimant's use of a cane at times and difficulty with balance. Claimant was given a medical necessity note in 2004 for a wheeled walker with a seat because of progressive problems with her ability to ambulate. Based on these records, I find the assumptions used by Dr. Cohen to reach his opinion on the combination of the injuries were flawed, and to the extent that he relied on these flawed assumptions to reach his conclusion on combination, his opinion in that regard is also flawed and is not competent, credible or reliable.

Therefore, based upon my finding that the worsening of the MS condition represented a subsequent deterioration unrelated to the primary injury, and based upon Claimant's failure to prove that the combination of the pre-existing and primary disabilities rendered Claimant permanently and totally disabled (as opposed to just the MS condition in and of itself), I find that Claimant has failed to meet her burden of proof that she is permanently and totally disabled under the statute against the Second Injury Fund.

The last issue, then, is whether Claimant is entitled to some amount of permanent partial disability from the Second Injury Fund based on the combination of her primary (February 7, 2005) injury and any pre-existing permanent partial disabilities. Having thoroughly considered all of the competent and credible evidence in the record, I find that Claimant is not entitled to a permanent partial disability award against the Second Injury Fund either, since the disability from the primary injury (February 7, 2005) does not meet the applicable threshold contained in the statute necessary for an award of permanent partial disability benefits.

As noted above, in order to award permanent partial disability benefits from the Second Injury Fund, the pre-existing disability and the subsequent compensable (primary) injury each must result in a minimum of 12.5% permanent partial disability of the body as a whole, or 15% permanent partial disability of a major extremity. In this case, I have found that Employer has responsibility for 10% permanent partial disability of the left knee related to the February 7, 2005 primary injury. Since that 10% permanent partial disability of the left knee is less than the threshold amount of 15% of a major extremity, I find that Claimant does not qualify for Second Injury Fund permanent partial disability benefits.

For all of the above-stated reasons, Claimant is entitled to receive 10% permanent partial disability of the left knee attributable to the February 7, 2005 injury from Employer, but Claimant's Claim for permanent total and permanent partial disability benefits against the Second Injury Fund is denied.

CONCLUSION:

Claimant had a compensable injury to her left knee, resulting in a subtle osseous deformity involving the medial femoral condyle discovered on the MRI, and also mild joint effusion, very mild lost range of motion and tenderness, but no crepitus or instability, on February 7, 2005. Claimant has failed to prove an entitlement to future medical care for the left knee related to this accident at work. Claimant is permanently and totally disabled under the statute, but that permanent total disability is not against Employer as a result of the last injury alone. Employer is responsible for the payment of 10% permanent partial disability of the left knee attributable to the February 7, 2005 injury. Based upon my finding that the worsening of the MS condition represented a subsequent deterioration unrelated to the primary injury, and based upon Claimant's failure to prove that the combination of the pre-existing and primary disabilities rendered Claimant permanently and totally disabled (as opposed to just the MS condition in and of itself), Claimant has failed to meet her burden of proof that she is permanently and totally disabled under the statute against the Second Injury Fund. Finally, Claimant does not qualify for Second Injury Fund permanent partial disability benefits, since the primary (February 7, 2005) injury, does not meet the appropriate statutory threshold. Therefore, the Claim against the Second Injury Fund is denied and no benefits are awarded in this case. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Jeffrey P. Gault, for necessary legal services.

Date: _____ Made by: _____

JOHN K. OTTENAD
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Naomi Pearson
Division of Workers' Compensation